

Radmacher v Granatino: judicial status of pre marriage agreements

David Hodson

Introduction

The Court of Appeal decision in Radmacher v Granatino (2009) EWCA Civ 649 (2 July 2009) is likely to be strongly determinative of the future judicial treatment of premarital and other marital and similar domestic relationship agreements. Until there can be Parliamentary intervention, perhaps as a consequence of the forthcoming Law Commission investigation or other recommendations, this case will materially influence judges and practitioners in the weight to be given to marital agreements. The three judgments look not just to the narrow issues in the particular case but at the future for this area of developing law and social policy.

Whilst like most Court of Appeal ancillary relief decisions it relates to big money and relatively narrow facts, unlikely often to be repeated, in this instance the Court of Appeal has handed down a judgement to provide wider guidance. Moreover whilst the case itself concerned a pre-marriage agreement in the international dimension, the remarks by the judges were equally directed to purely national couples and agreements entered into in this country.

At paragraph 53 of the judgment Lord Justice Thorpe made the following statement:

“in future cases broadly in line with the present case on the facts, the judge should give due weight to the marital property regime into which the parties freely entered. This is not to apply foreign law, nor is it to give effect to a contract foreign to English tradition. It is, in my judgment, a legitimate exercise of the very wide discretion that is conferred on the judges to achieve fairness between the parties to the ancillary relief proceedings.”

By reference to marital property regime in the international context there should also be construed the marital agreement regime in the national context i.e. what the parties agreed before and during the marriage in substitution for what might be the outcome of an adjudicated settlement at court on divorce.

This takes the law further towards support for marital agreements than even the observations in Crossley (2007) EWCA Civ 1491 in which the agreement was referred to as of “magnetic” and “paramount importance”.

This article looks at the case and the present direction given to the law in the judgements along with good practice

Background to the case

The matter came before the High Court, Mrs Justice Baron, in NG v KR (Pre-Nuptial Contract) [2008] EWHC 1532 (Fam). The wife appealed and leave to appeal was given in Radmacher v Granatino [2008] EWCA Civ 1304. The matter has now been heard in the Court of Appeal. (It is however worth observing that the leave to appeal was only allowed on the basis that she paid into joint deposit the lump sum of the High Court order of £5.56 million, as she had not taken any of the steps required by the High Court order in compliance with that order and there was evidence that she had appeared to have taken steps to hide her liquid assets in order to obstruct enforcement of the lump sum (para 88). It must be right, especially in international cases where enforcement can be a real difficulty, for there to be performance of the original order or at least security given before the appeal shall proceed.)

The parties married on 28 November, 1998 and separated in August 2006. The wife is German and the husband is French although with Italian connections. There are two children who are almost 10 and 7 years of age, spending about two thirds of their time with the wife originally in Dusseldorf, Germany and now in Monaco, and the remaining time with the husband in England. Crucially, before they were married, on 1 August 1998 they signed in Germany before a German notary a pre-marriage agreement which provided that on divorce, neither party would have any financial claims against the other. On divorce the husband made claims for financial provision. The wife was said to be worth in excess of £100 million, almost entirely inherited or received by gifts from her family. The primary issue for the court was the pre-marriage agreement.

It is the system across many continental European countries for pre-marriage agreements, binding on divorce and sometimes on death, to be the subject of advice to the couple by one lawyer, usually a notary, rather than independent legal advice as customary in England. Nevertheless it is thoroughly conventional and normal for these agreements then to be upheld as binding. Within England, with our expectation that justice and fairness can only be done by and to the parties by their knowing their rights and entitlements as explained by their own lawyer, there is a real gulf in understanding how one lawyer can properly represent both parties in what may be very contrary and different positions about the agreement. Many family lawyers have had experience of clients who have entered into agreements regarding holding property abroad, with the assistance of a single lawyer, and yet not fully understanding what it is they have signed or the implications, and certainly without feeling any confidence that their position has been properly represented. It allows massive opportunity for power imbalances and unfair agreements. How should the English court deal with them?

Expert evidence was presented to the court that both the German courts and the French courts i.e. the courts of the parties' nationalities, would treat this particular agreement as binding. So, it was argued by the wife, should England.

The background to the agreement was that the wife said that she was very keen that no man should marry her for her money, because she was so wealthy, and only do so for love. So if any man was prepared to sign away all of his rights, then it must be love! In other times, a male suitor would have had to prove his love by going to slay dragons. Today, he has to sign away his rights in a pre-marriage agreement. Without such an agreement, she would not have got married, she said. The court found that they were both deeply in love and keen to marry. They were in their late 20s.

The husband had a very different story. He said that his wife had told him that she would be disinherited if she did not sign the agreement. It was being forced on her by her father, the originator of the family wealth. The husband didn't want to cause a rift within her family, particularly between her and her parents especially as she still was receiving capital from them. Her family wanted her to sign and so he said to her that he would do so. He wanted to marry her in any event and they were deeply in love. He accepted that he didn't at the time necessarily expect the circumstances in which he would need to make a claim.

Before the marriage and until 2003, the husband was working as a banker earning a substantial income. At its height it was about £470,000 per annum. The wife was obviously wealthy and had set herself up in business. It was therefore reasonable at the time to expect that he would not need to make any claims.

However in July 2003, about five years into the marriage, the husband gave up banking and started studying biotechnology at Oxford University. There was evidence that this was with a view to creating a biotechnology business and being at the forefront of certain developments which could have produced substantial financial returns. However by the final hearing, he was still studying, and therefore not in receipt of any income nor with the certain likelihood of any income for the future. He had no substantial capital to keep the children in any standard approaching that of the marriage. He had no means of

supporting the children when they were with him for about a third of the year. He had no provision for accommodation when they were with him. In these circumstances he made financial claims.

There was clear evidence that the agreement had been instigated by the wife's family. The notary undertook other work for the wife's family. The wife's mother instructed the notary initially and the document was first sent to the wife's father for approval. Crucially it was in German and the husband didn't speak German. The wife said she went through the agreement line by line with him. The husband denied this. He said that the notary translated it in broken English. As a matter of public policy, should a person be held to an agreement if they sign it without fully knowing its consequences e.g. it is in another language? Alternatively if a person is foolish enough to sign a document in a language they do not understand, why should they not be held to their actions? In any event, he understood that it was to help the wife with her family and that no great importance was being placed by her on it. The High Court found that in this way he had been lulled into a false sense of security and that in fact the wife was relying on it.

Findings of the High Court

The court found in respect of the pre-marriage agreement that

- there had been no disclosure of her financial circumstances and that the husband did not fully know what he was giving up when he entered into the agreement
- although he may be a man of commerce, he had had no independent legal advice before signing the agreement and he did not understand fully the legal consequences on divorce of what he was signing
- there was no provision in the event of a child
- there was no provision for real need, the situation which now presented itself as he was no longer working by agreement

The court looked through the development of pre-marriage agreements in English law including the 1998 Government Green Paper "Supporting Families" and more recent case law. It found that the position in law is relatively straightforward namely that they are not binding however will be taken into account, perhaps materially taken into account, if there has been disclosure, independent legal advice, lack of mistake or duress and the outcome is generally fair. Although the judgements in the High Court and Court of Appeal explore the issue of whether such agreements might be void for public policy, this was never seriously advanced at any level.

The High Court quickly came to the opinion that it was not obliged to follow the agreement. Because of the findings set out above, it was satisfied that it was not fair to make no order or indeed only the provision offered by the wife. The fact that the prenuptial contract made no provision in circumstances of the birth of children, and indeed omitted any consideration of such factors was a flaw which the judge considered made the deal *prima facie* unfair.

Nevertheless the High Court also found that the English court should give some weight to what might have been the outcome if the case had been dealt with in another country with which the couple had connection. This is based on the series of cases starting with *Otobo* (2003) 1 FLR 192. For this reason the High Court felt that it should not grant the full provision to the husband as if the pre-marriage agreement had not existed and instead should moderate the award. The consequence of the pre-marriage agreement was that the settlement should be at the lower end of the possible range of fair outcomes.

The husband was awarded £5.56 million representing an English housing fund of £2.5 million, £700,000 to pay debts and £2.335 million capitalised maintenance along with child periodical payments of £70,000 per annum and a house in Germany for contact purposes of £600,000.

The High Court judge also added in relation to costs liability that when the court is assessing a case on the basis of need, this means that costs have to be covered or needs are not otherwise met. Thus in reality in the case the payer wife would have to bear all of the costs. There was no alternative

The Court of Appeal verdict

Giving the lead judgment, Thorpe LJ allowed the wife's appeal. It was held that Baron J had not given sufficient weight to the existence of the agreement in her initial award. The judges (also Wilson LJ and Rix LJ) found it difficult to see where there had been any discount in the award to the husband for the fact of the agreement, a crucial aspect of the High Court decision. Where an agreement was valid as binding in the couple's own countries and there was no evidence of duress, misrepresentation or a lack of opportunities to take legal advice etc then the court would give it substantial weight in the section 25 discretionary exercise.

Instead of making the English accommodation provision to him outright, the court felt that it should be only until the youngest child was 22 years of age and then revert to the wife, in conventional Mesher terms. It was intended for him as father rather than as husband. The existence of the agreement was persuasive to convert the outright capital provision into a lesser Mesher provision.

The provision of payment of his debts of £700,000 remained, including a debt of £85,000 in respect of relocation proceedings in which the court had made no order as to costs. Notwithstanding this "no order", his liability for costs still remained as needs and had to be met by the payer wife.

However the award of capitalised maintenance of £2,335,000 had to be reformulated as the claim by the husband should be reflected as homemaker for the children rather than traditional stand-alone spousal maintenance. This was a capitalisation of approximately £100,000 per annum. The Court of Appeal decided that the payments should only continue for the next 15 years until the youngest child was 22 years of age, and not for life or retirement. It should take into account the £70,000 per annum being paid as child maintenance. As the issue of his income needs qua father rather than also qua husband had not been addressed before the Court of Appeal, directions were given for the separate, later adjudication of this issue. It is anticipated that again it will be capitalised. For this reason, the headline news in some of the media about the outcome to the case is inaccurate.

Nevertheless the central principle was that the existence of the pre-marriage agreement converted the husband's claims for spousal maintenance to the narrow ambit of needs as homemaker and carer for the children when they were with him. In certain ways it became more akin to a Schedule 1 Children Act outcome. However the court was anxious to stress (para 155) that there should not be a disparity, described as "so substantial as to be invidious", between the quality and value of the residence of the husband with that of the wife. This issue of differing standards of living has often arisen in Schedule 1 cases.

The final element was that the High Court had given the husband €600,000 to purchase a property to stay with the children when visiting them on contact in Düsseldorf. This was also on Mesher terms. The husband said that as the wife had now relocated to Monaco, he needed more due to higher property values. The Court of Appeal ordered a further enquiry to determine if a larger figure was more appropriate.

Media headlines have stated that the husband's claim was reduced from £5 million to £1 million. This is misleading because the new amount of his spousal maintenance, probably capitalised, has yet to be determined as has the amount to receive for accommodation in Monaco.

Nevertheless the dramatic difference is that instead of the husband receiving his award outright and qua spousal husband, he is receiving a reduced amount, and some of that on trust only, qua father and carer

of the children during substantial contact visits. This was the impact of the agreement.

Contrary to the findings of the High Court judge, the Court of Appeal was satisfied that the husband knew what he was signing, knew approximately the level of wealth of the wife, had chosen not to take legal advice and there was no good reason not to hold him to the agreement subject to the section 25 criteria which generally produced an outcome of provision as father rather than provision as husband.

This difference is likely to find its way into many more outcomes when there has been a pre-or other marital agreement.

Court of Appeal commentary on marital agreements

Lord Justice Thorpe started his judgement by looking at the European dimension, the introduction of Brussels II, the unsatisfactory consideration thus far by the European Union of harmonisation of marital property regimes across Europe and likely future developments. He highlighted (para 11) the capricious outcomes following Brussels II where simply by issuing first one party is able to determine which country deals with the divorce and therefore the financial elements. If this case had been dealt with in either France or Germany, the husband would have had no claims whatsoever yet in the High Court in England he had recovered at first instance approximately £5 million. This is the great injustice, unfairness and capriciousness of the first to issue principle in Brussels II, so much condemned by English family lawyers

Lord Justice Thorpe then turned to developments within England. He humbly referred (para 12) to his own judgement in F v F (1995) 2 FLR 45, in which he had said that a foreign pre-marriage agreement in this jurisdiction must be of limited significance, by saying that he would not now be so dismissive. He referred (para 14) to the Home Office 1998 Green Paper, "Supporting Families", in which the Government had proposed binding pre-marriage agreements subject to certain preconditions and safeguards and with a narrow discretionary opportunity to intervene. Nothing further had then progressed with these proposals. He highlighted (Para 23) that the Law Commission has recently embarked on an examination of the status and enforceability of agreements between spouses and civil partners considering their property and finances, with a report and a draft Parliamentary Bill anticipated in 2012.

The Court of Appeal was inevitably influenced by the decision of the Privy Council in McLeod (2009) 1 AER 851, which however had considered there was a clear distinction in law between the status of premarital and marital agreements. Whereas a marital agreement had some statutory status, a pre-marriage agreement did not and was therefore to be treated as much weaker and with much less substance in the discretionary exercise on divorce. Lord Justice Wilson indicated (para 125) that he would not wish to express himself so negatively as did the Privy Council. He would not draw such a sharp distinction. Whilst of course there are very different behavioural elements including the pressures of whether or not to go ahead with the wedding or with the marriage if the agreement is not signed, he felt none of these features gave rise to such a distinction. In his opinion, any statutory development needs to provide as much protection for existing spouses entering into agreements during marriage as intended spouses in the context of pre-marriage agreements. Very many practitioners were also uneasy at the rather legalistic distinction made by the Privy Council and would feel a much closer alignment with the sentiments expressed by Lord Justice Wilson.

Although the Family Division judiciary had responded to the 1998 Government Paper proposing binding pre-marriage agreements to the effect that such agreements should only be a section 25 factor, Lord Justice Wilson indicated that he was in the minority who preferred much greater weight being given to private autonomy. He said (para 127) that 11 years later, he would be even more strongly arguing for reform that made such agreements binding, described as "presumptively dispositive". He felt unhappy that whereas other countries with a discretionary system such as Australia and some states of the US were quite content to have binding marital agreements, England did not. He preferred a starting point

for both parties to be required to accept the consequences of whatever they have freely and knowingly agreed.

Lord Justice Wilson then stated (para 130) the existing law in relation to prenuptial contracts by quoting from Mrs Justice Baron in NA v. MA (2007) 1 FLR 1760 when she said:

“111. I am certain that English courts are now much more ready to attribute the appropriate (and, in the right case, decisive) weight to an agreement as part of “all the circumstances of the case” [within the meaning of s.25(1) of the Act of 1973] ...

119. Upon divorce, when a party is seeking quantification of a claim for financial relief, it is the court that determines the result after applying the Act. The court grants the award and formulates the order with the parties’ agreement being but one factor in the process and perhaps, in the right case, it being the most compelling factor ...”

Coupled with the Crossley judgement referred to above, this was the correct state of the law (para 132).

Lord Justice Thorpe said:

28. I hold this opinion on the following foundations:

i) Any provision that seeks to oust the jurisdiction of the court will always be void but severable.

ii) Any contract will be voidable if breaching proper safeguards or vitiated under general principles of the law of contract.

iii) Any contract would be subject to the review of a judge exercising his duty under s.25 if asserted to be manifestly unfair to one of the contracting parties.

29. I also hold my opinion because:

i) In so far as the rule that such contracts are void survives, it seems to me to be increasingly unrealistic. It reflects the laws and morals of earlier generations. It does not sufficiently recognise the rights of autonomous adults to govern their future financial relationship by agreement in an age when marriage is not generally regarded as a sacrament and divorce is a statistical commonplace

ii) As a society we should be seeking to reduce and not to maintain rules of law that divide us from the majority of the member states of Europe.

iii) Europe apart, we are in danger of isolation in the wider common law world if we do not give greater force and effect to ante-nuptial contracts.

Lord Justice Rix contributed on this issue: *If it were open to me, which I recognise it is not, I would therefore have wanted to suggest that the language of invalidity and public policy is no longer appropriate and that section 25, as it has come to be applied to pre-nuptial agreements, can operate without it. It would simply be that in any question of ancillary relief the court would be bound to have regard to all the circumstances of the case. (para 66) I have expressed myself in sceptical terms as to the virtues of a doctrine of invalidity on the ground of public policy. I see great force in a doctrine of presumptively valid. I would merely observe that, while the public interest in a fair and just exercise of the court’s discretion remains, there is fairness and justice too in a proper appreciation of party autonomy: and that there are dangers in overly paternalist or patronising attitudes or in an insufficiently international outlook. (para 83)*

Lord Justice Thorpe was satisfied that making provision for the husband in his role as father rather than former husband was necessary to give proper weight to the pre-marriage agreement (para 51). He said it allowed the judges to factor into the discretionary balance the fairness considerations to alleviate the injustice that would otherwise result from the jurisdictional rules introduced by Brussels II and the widely

diverging legal and social traditions of civil and common law states in Europe. He felt there was no purer route to fairer outcomes (para 52).

He added that the application of the relevant forum law does not offer an attractive solution to family lawyers and policymakers in England given the obligation would extend to all foreign laws. The gulf between English statute law and Sharia law was wide indeed (para 52). He confirmed the existing policy opinion against the introduction by the European Union of applicable law into English national family law.

Hence pending statutory reform, he said that in future cases broadly in line with this case, the judge should give due weight to the marital property regime into which the parties have freely entered (para 53) i.e. the agreement they have adopted before or during marriage. It was in his judgement a legitimate exercise of the very wide discretion conferred on judges to achieve fairness between the parties to the ancillary relief proceedings.

Legal advice

One of the troublesome aspects of the case had been that the husband had not received independent legal advice on the agreement. This had been one of the crucial factors in the High Court yet was not so relevant in the Court of Appeal. Lord Justice Wilson dealt with this aspect. He said that the receipt of independent legal advice before entry into an agreement is often the only, and certainly simplest, way of demonstrating that a party entered into it knowingly (para 137). He found that in this particular case the husband had the opportunity to take independent legal advice if he had wanted to do so. He could have obtained a translation. He found that there was no evidence that if the husband had taken legal advice and perhaps been advised against entering into it, he would nevertheless not have signed it. For the husband, such an agreement was a natural and normal part of his national and cultural milieu. It was not regarded as surprising or unfair. In all the circumstances of the case, the Court of Appeal did not consider it was right to discount the agreement because of the lack of taking independent legal advice.

Lord Justice Wilson went on to say (para 140) that it may be that in the interests of simplicity any legislative reform would require a condition that independent legal advice should be received. This is the position in Australia. However until that state of legislation applies, the Court of Appeal was satisfied that in the particular circumstances where a husband well understood the effect of the contract, had ample opportunity to take independent advice and decided not to do so, it would be wrong then to reject the agreement to which he then entered.

Practitioners need to be cautious therefore in suggesting that the absence of independent legal advice will nevertheless safeguard a marital agreement. Good practice must be always to recommend that both parties take independent legal advice. If one refuses to do so, having the time and opportunity and ability to take legal advice and probably being aware of the nature of such agreements both generally and specific to the agreement in hand, then it might be possible to proceed. However if there is any question that one party had not had the time and opportunity and ability to take legal advice and genuinely did not understand what it was they were signing and perhaps there were surrounding elements of duress or pressure, then the lack of independent legal advice may still be fatal.

A similar provision applies to disclosure. Again good practice is that there should be a reasonable level of disclosure of the resources available to each party. If there has been deliberate nondisclosure or misrepresentation then this will go to the lack of confidence the court will place on such an agreement. However if one party chooses not to pursue detailed or any disclosure yet having a general idea of the finances of the other spouse, and in the absence of obvious duress and pressure etc, then again this should not be fatal to the agreement itself.

The Cambridge Conference and the Centre for Social Justice

This decision came immediately after an international conference at Cambridge University on the 26th June under the auspices of the Law Commission when international academics and practising lawyers discussed the whole issue of premarital agreements. Those attending were very aware of the importance both nationally and internationally of finding a way forward, and at least for mutual understanding and respect, and preferably towards international enforceability. Nevertheless the excellent presentations from at least a dozen countries merely highlighted the vast range of different sorts of marital agreements which exist, the very different behavioural attitudes towards private autonomy, the correlation between the frequency of such agreements and the happiness or otherwise of the population with the divorce law, and the very real difference in respect of maintenance across continental Europe. Although this Court of Appeal decision has brought us nearer to continental Europe, there are still very many attributes of the regime of matrimonial property law abroad which will be unattractive and unacceptable here.

This Court of Appeal decision came about 10 days before the launch of a major report by the Centre for Social Justice, a Westminster think tank, on a wide range of family law issues, perhaps the most wide ranging family law reform recommendations for several decades. It is reported that it will include a new model for ancillary relief law along with a recommendation for binding marital, premarital, civil partnership and other domestic relationships.

Marriage for love or?

This case highlights again the very real difficulties with pre-marriage agreements. Although undoubtedly they are contracts, they are entered into by two people deeply and passionately in love and looking forward to spending their entire lifetime together, and sometimes becoming parents of children and grandchildren. Despite the anecdotal evidence, it is not always the woman who is most emotionally committed to the marriage. It is experience of many practitioners that commercial common sense simply walks out the door when business people and professionals are presented with a pre-marriage agreement in circumstances where they are very keen to marry. The person who would scrutinise the small print on a car hire agreement or go through every line of a professional contract will often quickly sign up to a pre-marriage agreement, especially if strongly encouraged by their spouse to do so and it might otherwise put the marriage at risk. "I signed because I loved you."

Yet years or decades later the family courts have to unravel this exercise. England has always regarded a safeguard of independent representation. If there was no independent legal advice, then it made the agreement have little weight and little risk. Is this indeed a good enough safeguard? What other safeguards should be in existence? The government in 1998 suggested pre-marriage agreements should be entered into a period of time, perhaps 21 days or 28 days, before the wedding yet in this case before the Court of Appeal the pre-marriage agreement was signed four months before the wedding and still there were problems.

One primary problem with pre-marriage agreements is the complete uncertainty of what might occur over a medium or long marriage with all the eventualities of life and relationships. This is one primary reason why such agreements may not become a cultural norm for many years in England. As they do not have a fundamental feature of opting out of any imposed matrimonial regime, at least on the present law, and as the perception of being unromantic and "planning to fail" still prevails, any primary legislation allowing mandatory pre-marriage agreements may not change the culture for many years.

England is not alone in placing great weight on separate legal representation as a safeguard for the parties before entering into such an agreement. Australia has introduced binding financial agreements, for pre-marriage, during the marriage and on separation. The lawyer for the parties has to sign a certificate in very strict terms about the advice given to the parties including about whether or not to enter into the agreement at all. A similar provision is likely to be incorporated into any primary legislation in England, perhaps with a caveat indicating that they had the opportunity to take legal advice. If this

were so, then it would put us again at odds with a number of countries across continental Europe.

Perhaps the biggest issue for family law practitioners from this decision is the much greater weight which will now be placed on marital agreements including pre-marriage agreements, outside the particular circumstances of a big money, very short marriage Crossley case. Whilst it would never be suggested that English family law practitioners have treated pre-marriage agreements with any careless abandon, nevertheless there has always been the feeling that there is the ultimate safety net that the court will intervene if there was injustice. One of the very stark differences in working in Australia is that suddenly the safety net is removed, other than for very exceptional injustice, and that what is being negotiated by the lawyer and agreed for the pre-marriage agreement is all that the client will ever have from the marriage on divorce!

Whilst England does not yet have binding marital agreements by statute law, although it may be no more than five years or so away, England does now have a much greater likelihood that agreements freely and voluntarily entered into, perhaps even with one party choosing not to take legal advice, will be given some, probably considerable and even perhaps very substantial weight in the section 25 fairness criteria. The safety net still exists but it is now narrower and certainly cannot be relied on in advance. The skills and care of the English family law practitioner in the context of marital and other domestic relationship agreements must now be greatly intensified and improved.

David Hodson is an English and Australian solicitor and mediator, a Deputy District Judge at the PRFD and a consultant at The International Family Law Group, London. He is the author of "A Practical Guide to International Family Law" (Jordans 2008) and "When Cupid's Arrow Crosses National Boundaries: a guide for international families" (IFLG Press 2009)

David Hodson
dh@davidhodson.com
© July 2009